Petition

No. 81-1187

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CLERK

IN THE

Supreme Court of the United States

October Term, 1981

MIDDLEBURY ASSOCIATES,
Petitioner,

vs.

PIKE INDUSTRIES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT

IRVING M. SHUMAN, ESQ.
2600 Main Place Tower
Buffalo, New York 14202
Counsel for Petitioner

GROSS, SHUMAN, BRIZDLE, LAUB
& GILFILLAN, P.C.
2600 Main Place Tower
Buffalo, New York 14202
Of Counsel

December 23, 1981

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Question Presented for Review

Should a court be permitted to grant relief to a plaintiff on a cause of action neither pleaded nor proved based upon evidence which the defendant introduced to prove unrelated matters, when the defendant had no notice that the evidence would be used against it in that fashion?

II.

Parties to the Proceeding in the Court Below

Plaintiff:

PIKE INDUSTRIES, INC.

Defendants:

MIDDLEBURY ASSOCIATES
MIDDLEBURY DEVELOPERS, INC.
R. E. BEAN CONSTRUCTION CO., INC.
TRUSTEES OF HANOVER SQUARE
REALTY INVESTORS

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IN THE

Supreme Court of the United States

October Term, 1981

No._____

MIDDLEBURY ASSOCIATES,

Petitioner,

vs.

PIKE INDUSTRIES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT

The petitioner, Middlebury Associates, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of the State of Vermont entered in this proceeding on November 24, 1980.

Opinions Below

The opinion of the Vermont Supreme Court from which petitioner seeks certiorari is contained in the Appendix hereto at page 1a, as is the subsequent Vermont Supreme Court Opinion upon reargument (see Appendix at page 35a). The original trial court Findings of Fact and Conclusions of Law, the first Vermont Supreme Court opinion reversing and remanding, and the subsequent trial court Findings of Fact and Conclusions of Law and the final order of the Vermont Supreme Court denying reargument are also contained in the Appendix.

Jurisdiction

The judgment of the Vermont Supreme Court was entered on November 24, 1980. A timely motion for reargument was granted, but the Vermont Supreme Court affirmed its original decision in a judgment entered August 14, 1981. Thereafter, a second timely motion for reargument was denied on September 30, 1981, and this Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257.

Constitutional and Statutory Provisions

UNITED STATES CONSTITUTION
Amendment Fourteen, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VERMONT RULES OF CIVIL PROCEDURE
Rule 54(c)

Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Statement of the Case

In 1973, the Petitioner, Middlebury Associates ("Middlebury"), a New York State general partnership, entered into a contract with the R. E. Bean Construction Co. ("Bean"), a New Hampshire corporation, for Bean to be general contractor on the construction of a shopping plaza in Middlebury, Vermont. Bean in turn subcontracted the task of paving the parking lot for said shopping plaza to Pike Industries, Inc. ("Pike"), also a New Hampshire corporation.

In 1974, Bean defaulted under its contract with Middlebury, leaving the construction of the shopping plaza incomplete, and its subcontractors, including Pike, unpaid. As a result, Pike filed a mechanic's lien against the shopping plaza.

In 1975, Pike commenced suit in the State of Vermont, Addison Superior Court, against Bean, Middlebury, and others, seeking payment for the work it had performed. Pike sought recovery from Bean from its subcontract and sought recovery from Middlebury on the mechanic's lien claim and on a claim that it had either a direct contract with Middlebury or that Middlebury had guaranteed Pike's subcontract with Bean. Middlebury cross-claimed against Bean for breach of contract.

Following trial, the Addison Superior Court held for Pike against Bean on its claim under the subcontract and for Pike against Middlebury on its claim of guarantee, rejecting the cause of action based upon the mechanic's lien. The Court left unaddressed Pike's claim of a direct contract with Middlebury. Further, the trial court denied Pike's trial motion to amend its complaint to conform with the evidence presented to include a

claim of unjust enrichment, pursuant to Vermont Rules of Civil Procedure, Rule 15(b), on the ground that this theory had not been tried by the parties. Lastly, the trial court dismissed Middlebury's crossclaims against Bean. (See 18a).

Middlebury appealed this decision to the Vermont Supreme Court. On appeal, the Supreme Court reversed the trial court, holding that a guarantee did not exist as a matter of law. It then remanded the case to the trial court for further hearings on the sole issue of whether or not there was a direct contract between Pike and Middlebury, and for reconsideration of Middlebury's crossclaim against Bean. (See 26a, 27a).

On remand the parties stipulated that the trial court should make its decision based solely on the evidence introduced at the original trial without any further hearings. Therefore, without the introduction of any additional evidence, the trial court found for Pike against Middlebury on a direct contract, and that Middlebury was entitled to damages for breach of contract from Bean. (See 33a, 34a). Middlebury again appealed to the Vermont Supreme Court, asserting that the trial court was in error in finding a direct contract between itself and Pike.

On appeal, the Supreme Court, ignoring the directions posed in its own remand order, failed to address the issue of whether the trial court had properly found a direct contract. Instead, the Court, sidestepping the trial court's holding that it apparently could find no basis in law to support, found that Pike was entitled to recover against Middlebury as a "creditor beneficiary" under the contract between Bean and Middlebury, a cause of action neither pleaded nor proved in the action. (See 4a).

In coming to this decision, the Court relied upon its interpretation of the contract between Middlebury and Bean, which Middlebury had offered as evidence to defend against Pike's mechanic's lien claim and to prove its crossclaims against Bean. At no time did Middlebury have any expectation that the contract between it and Bean would be used against it in any manner, nor was it so used at trial.

Following this decision, Middlebury made timely motion for reargument, claiming violation of its right to procedural due process under the 14th Amendment to the United States Constitution as well as directing the Court's attention to language within the contract itself which precluded any claim by Pike that it was a third-party beneficiary.

Upon reargument, the Court rejected Middlebury's due process claims stating that, "a review of the record makes it abundantly clear, that the legal basis for the result reached derives directly from the facts already developed in the proceedings . . .", and reaffirmed its judgment. (See 39a). A further timely motion for reargument by Middlebury was denied September 30, 1981. (See 42a).

Argument

Pike, a subcontractor, sought to hold Middlebury, the owner, directly liable on several theories of liability. It failed utterly. Middlebury was able to defend itself completely against each and every cause of action. Despite this, Middlebury now finds itself liable to Pike for the sum of $115,651.13, plus interest from 1974.

This result was possible only because the Vermont Supreme Court, *sua sponte*, held for Pike on a cause of action never pleaded by Pike and on which no proof was ever offered at trial. The only basis in the record cited by the Vermont Supreme Court was evidence submitted by Middlebury in defense of Pike's mechanic's lien claim and in support of its crossclaim against Bean. By so holding, the Vermont Supreme Court deprived Middlebury of its right to procedural due process and, for that reason, this Court should grant this Petition for Certiorari.

The apparent source of the Vermont Supreme Court's power to search out causes of action for deserving plaintiffs is Vermont Rules of Civil Procedure Rule 54(c), which provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings". This rule is identical to Rule 54(c) of the Federal Rules of Civil Procedure. Thus the Court always has the power to conform the pleadings to the evidence presented [pursuant to VRCP §15(b), again identical to FRCP §15(b)] or to otherwise grant equitable relief. But this power is limited. As the federal courts have made clear, a court may grant relief not requested only when the defending party has had notice of the claims against him and an opportunity to defend against those claims. Absent such notice, a party cannot be said to have had any meaningful procedural due process protection.

"[A]t the core of the procedural due process right is the guarantee to be heard". Lawrence Tribe, *American Constitutional Law* (Mineola, New York, 1978) pp. 550-551. Thus, due process requires that there must always be an

opportunity to present every available defense and to present all relevant evidence. See *American Surety Co. v. Baldwin*, 287 U.S. 156, 158 (1932); *Morgan v. United States*, 304 U.S. 1, 18 (1938). This principle has been applied a number of times by the federal Courts of Appeals in circumstances strikingly similar to those of the case at bar, to prevent courts from roving too far afield in efforts to grant judgment to one party or another.

In *Jimenez v. Tuna Vessel Granada*, 652 F.2d 415 (5th Cir. 1981), the plaintiff sought damages from the defendant for injuries sustained while on board the vessel and alleged, *inter alia*, that the vessel had been unseaworthy, in that a powerblock had been improperly operated, causing him to be thrown overboard. In rebuttal, the defendant introduced evidence that the plaintiff had fallen overboard while stacking nets and attached cork floatation devices. The trial court found that the method of stacking nets rendered the vessel unseaworthy and awarded judgment to the plaintiff.

The Fifth Circuit held that the trial court's actions deprived the defendant of procedural due process. Warning of "trial by ambush", the court stated that:

> Where a party does not recognize the significance of evidence and so fails to contest it, he cannot realistically be said to have given his implied consent to the trial of unpled issues suggested by it, always assuming that his failure to grasp its significance was reasonable. A prime example of such a circumstance occurs when evidence is introduced that is relevant to an issue already in the case and there is no indication that the party who introduced the evidence was seeking to raise a new issue. 652 F.2d at 421. See also *International Harvester Credit Corporation v. East Coast Trust*,

547 F.2d 888 (5th Cir. 1977); *Bernard v. Florida East Coast Ry. Co.*, 624 F.2d 552 (5th Cir. 1980); *Mineral Industries v. Occupational Safety and Health Review Commission*, 639 F.2d 1289 (5th Cir. 1981).

Similarly, the Tenth Circuit has held, in *R. A. Pohl Construction Co. v. Marshall*, 640 F2d 266 (10th Cir., 1981) that there must be a very clear indication in the record that the evidence which is sought to be used as a basis for the argument that there was implied consent to try new issues was, in fact introduced to raise a new issue. 640 F.2d at 269.

In the case at bar, the Vermont Supreme Court had remanded the matter to trial court with specific instructions; hold further hearings on the issue of whether or not there was a direct contract between Pike and Middlebury. All evidence was directed toward that end. Middlebury itself introduced the contractual documents the Vermont Supreme Court later relied on for unrelated purposes of defending itself against Pike's mechanic's lien claims and pursuing its crossclaims against Bean. Under no conceivable set of circumstances could Middlebury have been said to have reasonably expected this evidence to be used in a different manner or to have consented in any manner to trial of new issues. It is clear that Middlebury's right to procedural due process was violated by a court anxiously searching for a basis of liability upon which to hang Middlebury. Thus, a clear conflict exists between the Vermont Supreme Court and the Fifth and Tenth Circuits on a constitutional issue of great importance, requiring review by this Court.

The effect of this case upon Middlebury is enormous, but the implications of this case stretch well beyond the immediate parties. The Vermont Supreme Court has

placed itself in a position beyond that which is appropriate for a judicial body. Its proper role is that of arbiter between the parties before it. Within this role, it has the power to adjust the relief granted to the facts presented. It must always do so, however, in the context of the issues actually argued and the proof actually presented by the parties themselves. When it goes beyond this position, and grants relief upon a theory never litigated, upon evidence never presented, it deprives a litigant of its most basic right; the right to its day in court. A litigant should only have to defend itself against other litigants, not against the Court itself.

Conclusion

For these reasons, a writ of certiorari should issue to the review the judgment and opinion of the Supreme Court of the State of Vermont.

Respectfully submitted,

IRVING M. SHUMAN, ESQ.
GROSS, SHUMAN, BRIZDLE,
LAUB & GILFILLAN, P.C.
2600 Main Place Tower
Buffalo, New York 14202

Counsel for Petitioner

December 23, 1981

APPENDIX

Vermont Supreme Court Opinion Filed November 24, 1980

SUPREME COURT

On Appeal from Addison Superior Court
April Term, 1980

No. 427-79

PIKE INDUSTRIES, INC.,

v.

MIDDLEBURY ASSOCIATES, MIDDLEBURY DEVELOPERS, INC., R. E. BEAN CONSTRUCTION CO., INC., TRUSTEES OF HANOVER SQUARE REALTY INVESTORS.

PRESENT: Barney, *C.J.*, Daley, Larrow, Billings and Hill, *JJ.*

BARNEY, *C.J.* This is the second appeal in this case. The plaintiff, Pike Industries, Inc. (Pike), is still seeking to recover for paving work done as part of a Middlebury shopping center. An earlier hearing here led to a remand. *Pike Industries, Inc. v. Middlebury Associates,* 136 Vt. 588, 398 A.2d 280 (1979).

Middlebury Associates and Middlebury Developers, Inc. (Middlebury) are two interrelated organizations that planned the shopping center. They contracted with R. E. Bean Construction Company for construction of the center. Bean subcontracted with Pike for the paving work.

Appendix—Vermont Supreme Court Opinion Filed November 24, 1980.

On October 18, 1974, Pike pulled off the paving job, refusing to continue until assured that it would be paid. An attorney for Middlebury called Pike, and a telegram confirming the conversation followed. After the telegram Pike finished the job. On November 11, 1974, five days after Pike completed the paving work, Middlebury terminated the contract with Bean and took over the project, justifying the takeover under a provision of the main contract allowing Middlebury to take over construction if Bean breached the contract.

When Pike did not get paid for its work, it filed suit against both Bean and Middlebury. It sued Bean on the original subcontract, and it sued Middlebury as a surety, claiming the telephone conversation and telegram constituted a contrct of guarantee. The trial court found for Pike, holding Bean and Middlebury jointly and severally liable. Bean was found liable on the original subcontract, and Middlebury as a surety. Middlebury appealed.

On appeal, we found that the telegram did not satisfy the Statute of Frauds, and that therefore M'ddlebury could not be liable as a surety. The issue of whether the conversation and telegram constituted an original contract between Middlebury and Pike remained open, however, so we reversed the trial court judgment and remanded the case for a determination of whether there was an original contract between Middlebury and Pike. We noted that to find an original contract between Middlebury and Pike, the court would have to find a discharge of Bean, and the substitution of Middlebury in Bean's place.

On remand the trial court concluded that Middlebury's intervening negotiations with Pike (the conversation and telegram) after Pike had pulled off the job, coupled with the fact that Middlebury never paid Bean for the Pike work, indicated that Bean ceased to be liable to Pike after the conversation and ensuing telegram. The court also concluded that the conversation and telegram constituted a new contract between Pike and Middlebury. As a result of these conclusions, the trial court dismissed Pike's suit against Bean, and found Middlebury fully liable to Pike for the paving work, in the amount of $115,651.13 plus interest. Middlebury again appeals.

Middlebury first contends that, since Bean did not appeal the part of the original trial court decision holding Bean liable to Pike, that portion of the judgment still stands. Middlebury argues that that portion of the judgment constitutes *res judicata* with respect to Bean's liability to Pike for the paving work, and therefore, precludes the trial court from finding in the second hearing that Bean had been released from liability. We hold later in this opinion that Bean still is liable to Pike, however. Therefore, we need not address Middlebury's contention.

Middlebury next contends that there was no evidence to support the lower court's decision. They also allege lack of mutuality, indefiniteness, and lack of consideration. Examination of the original contract between Bean and Middlebury does not bear out Middlebury's claim, however. Article 16 of the Standard Form of Agreement Between Owner and Contractor, which Bean and Middlebury signed in setting up the project, provides for termination of the contract by either the Contractor (Bean)

or the Owner (Middlebury). It additionally provides that, if the Owner terminates the Contract,

> the Owner shall further assume and become liable for obligations, commitments and unsettled claims that the Contractor has previously undertaken or incurred in good faith in connection with [the project].

Bean was liable to Pike under the subcontract, since Pike had performed. By terminating the contract, Middlebury assumed Bean's previously incurred obligation to pay Pike according to the subcontract. Middlebury thereby owed a duty to Bean to pay Bean's debts. Pike is a creditor beneficiary of that obligation and may enforce Middlebury's duty to pay Bean's debt to Pike. 2 Williston on Contracts §361 (3d ed. 1959); see *Green v. McDonald*, 75 Vt. 93, 97, 53 A. 332, 333 (1902). (The law-equity distinction in our law, to which *Green* refers, has been abolished. 4 V.S.A. §219; V.R.C.P. 2). Pike therefore has a direct action against Middlebury and may recover accordingly.

That this basis of Middlebury's liability went unnoted below will not prevent us from affirming the superior court's judgment in favor of Pike. We will affirm a judgment which is correct, even if the grounds stated in support of it are erroneous. *Sexton v. Greer*, 135 Vt. 343, 345, 376 A.2d 750, 751 (1977).

On remand the trial court dismissed Pike's action against Bean, concluding that Bean had ceased to be liable after the telephone conversation and ensuing telegram. In fact, Middlebury merely assumed Bean's liability within the terms of the original contract. The

contract between Bean and Middlebury could not discharge Bean's liability to Pike; neither were Pike's acts sufficient to discharge Bean. In such a case, the applicable legal concept does not entirely discharge Bean, but preserves, for Pike's benefit, Bean's secondary liability. Williston, *supra;* see *Green v. McDonald, supra,* 75 Vt. at 97, 53 A. at 333. The judgment order dismissing the Pike claim against Bean should thus be stricken and replaced with an order preserving this liability.

On remand the trial court also concluded that Bean has breached the main contract between Bean and Middlebury. The court consequently awarded Middlebury $4,619.53 and costs from Bean. Bean appeals that portion of the trial court judgment.

An arbitration proceeding between Bean and Middlebury had preceded this superior court action. That proceeding settled the contract breach issue between Bean and Middlebury. Since the stipulation submitting the issue to arbitration bound Bean and Middlebury to the arbitration result, Middlebury may not reopen the issue in this case. See also *Bean v. Middlebury Associates,* _____ Vt. _____, _____, _____ A.2d _____, _____ (1980) (Docket No. 8-80, Slip Opinion at 3-4). The judgment will be amended to dismiss the Middlebury cross-claim against Bean.

Appendix—Vermont Supreme Court Opinion
Filed November 24, 1980.

Paragraph one of the judgment order is affirmed. Paragraph two is stricken, and a new paragraph 2 inserted to read:

2. In the event that Middlebury does not meet its obligation to pay Pike, Pike may obtain recovery against Bean in the amount of $115,651.13, plus interest at the legal rate from and after December 25, 1974, plus costs.

Paragraph three is stricken and a new paragraph three inserted, to read as follows:

3. The cross-claim of defendants Middlebury Associates and Middlebury Developers, Inc. against defendant R. E. Bean Construction Co., Inc. is dismissed, with costs to defendant R. E. Bean Construction Co., Inc.

The judgment order as so amended is affirmed.

Middlebury to bear costs in this Court.

FOR THE COURT:

ALBERT W. BARNEY
Chief Justice

Vermont Supreme Court Order Filed
November 24, 1980

ENTRY ORDER

Supreme Court Docket No. 427-79
April Term, 1980

PIKE INDUSTRIES, INC.,

v.

MIDDLEBURY ASSOCIATES,
MIDDLEBURY DEVELOPERS, INC.,
R. E. BEAN CONSTRUCTION CO., INC.,
TRUSTEES OF HANOVER SQUARE
REALTY INVESTORS.

Appealed From Addison Superior Court
Docket No. C28-75Ac

In the above entitled cause the Clerk will enter

Paragraph one of the judgment order is affirmed. Paragraph two is stricken, and a new paragraph 2 inserted to read:

2. *In the event that Middlebury does not meet its obligation to pay Pike, Pike may obtain recovery against Bean in the amount of $115,651.13, plus interest at the legal rate from and after December 25, 1974, plus costs.*

Paragraph three is stricken and a new paragraph three inserted, to read as follows:

Appendix—Vermont Supreme Court Order Filed November 24, 1980.

3. The cross-claim of defendants Middlebury Associates and Middlebury Developers, Inc. against defendant R. E. Bean Construction Co., Inc. is dismissed, with costs to defendant R. E. Bean Construction Co., Inc.

The judgment order as so amended is affirmed.

Middlebury to bear costs in this Court.

FOR THE COURT:

ALBERT W. BARNEY
Albert W. Barney
Chief Justice Concurring
RUDOLPH J. DALEY
Rudolph J. Daley
Associate Justice
ROBERT W. LARROW
Robert W. Larrow
Associate Justice
FRANKLIN S. BILLINGS, JR.
Franklin S. Billings, Jr.
Associate Justice
WILLIAM C. HILL
William C. Hill
Associate Justice

Dissenting:

Trial Court Findings of Fact and Conclusions of Law Filed December 6, 1977

PIKE INDUSTRIES, INC.,

vs.

MIDDLEBURY ASSOCIATES *ET AL.*

Addison Superior Court
Docket No. C28-75 Ac

FINDINGS OF FACT AND ORDER

STATE OF VERMONT, }
ADDISON COUNTY. } SS.

The above matter came on for hearing before the Addison Superior Court on June 20 and August 15, 1977. The plaintiff was represented at the hearing by W. Edson McKee, Esq. Defendants Middlebury Associates and Middlebury Developers, Inc. were represented by John A. Kelley, Esq. Defendant R. E. Bean Construction Co., Inc. was represented by John H. Carnahan, Esq.

Upon consideration of the pleadings, the evidence presented, the representations of counsel, and the requests for findings and memoranda of counsel, the Court makes the following findings of fact.

1. Middlebury Associates entered into a contract dated July 11, 1973, with R. E. Bean Construction Co., Inc., as general contractor, to construct a shopping

center in Middlebury, Vermont, known as Middlebury Shopping Plaza. (Defendants' Exhibit A).

2. The contract between Middlebury Associates and R. E. Bean Construction Co., Inc. required R. E. Bean Construction Co., Inc. to perform the following work:

a. Construction of an Ames Department Store.

b. Construction of an A&P Store.

c. Construction of satellite stores.

d. Installation of a parking lot, parking lot lighting, curb cuts and traffic signalization.

3. As a result of a dispute between defendant Bean and defendants Middlebury Associates and Middlebury Developers, Inc., the contract between the parties was terminated as of November 11, 1974. Defendant Bean alleges breach on the part of the defendant Middlebury Associates for failure to make timely payments on requisitions submitted for work completed. Defendant Middlebury Associates alleges breach on the part of defendant Bean for failure to submit evidence of costs incurred in the performance of the work and because of a reasonable doubt on the part of defendant Middlebury Associates that the work could be completed for the unpaid balance of the contract sum.

4. The contract between Middlebury Associates and R. E. Bean Construction Co., Inc. provided that Bean was to be conpensated for its costs incurred in performing the work plus a fee of $41,800.

5. The contract guaranteed Middlebury Associates that its cost for the work to be performed by Bean, including the contractor's fee of $41,800.00, was not to exceed $1,045,000.00 except as increased or decreased by change orders.

6. There were a total of $56,246.15 in change orders, increasing the contract sum to $1,101,246.15.

7. Prior to the time that the contract between Middlebury Associates and Bean was terminated, Middlebury Associates had paid Bean the sum of $683,721.60.

8. Subsequently, Middlebury Associates retained H. J. O'Connell Associates, Ltd. to perform certain work to complete the project in accordance with the contract between Middlebury Associates and Bean.

9. Middlebury Associates paid H. J. O'Connell Associates, Ltd. the sum of $304,447.48 for work performed by it.

10. Middlebury Associates also contracted with W. H. DeLong, Inc. to perform certain work to complete the project in accordance with the contract between Middlebury Associates and Bean.

11. Some of the work performed by W. H. DeLong, Inc. was in excess of the work called for in the contract between Middlebury Associates and Bean.

12. Of the work performed by W. H. DeLong, Inc., $85,837.50 was attributable to work done in accordance with the contract between Middlebury Associates and Bean.

Appendix—Trial Court Findings of Fact and Conclusions of Law Filed December 6, 1977.

13. Middlebury Associates also contracted with Raymond Brothers, The State of Vermont, James A. Ploof, Sr. and Ames Department Stores, Inc. to perform certain work to complete the project in accordance with the contract between Middlebury Associates and Bean.

14. Middlebury Associates paid Raymond Brothers, the State of Vermont, James A. Ploof, Sr. and Ames Department Stores, Inc. a total of $31,859.10 to complete the project in accordance with the contract between Middlebury Associates and Bean.

15. After the contract between Middlebury Associates and R. E. Bean Construction Co., Inc. was terminated, Middlebury Associates paid in the aggregate $422,144.08 to complete the work which was included within its contract with Bean.

16. The total amount paid by Middlebury Associates for the project was $683,721.60 (the amount paid R. E. Bean Construction Co., Inc.) plus $304,447.48 (the amount paid H. J. O'Connell Associates, Ltd.) plus $85,837.50 (the amount paid W. H. DeLong, Inc. attributable to the contract between Middlebury Associates and R. E. Bean Construction Co., Inc.) plus $31,859.10 (the amount paid to Raymond Brothers, James Ploof, Sr., the State of Vermont and Ames Department Stores, Inc.) for a total of $1,105,865.68.

17. The total amount paid by Middlebury Associates for the project ($1,105,865.68) exceeded the guaranteed maximum cost under the contract as adjusted by change orders ($1,101,246.15) by the sum of $4,619.53.

Appendix—Trial Court Findings of Fact and Conclusions of Law Filed December 6, 1977.

18. On January 13, 1976, R. E. Bean Construction Co., Inc. and Middlebury Associates and Middlebury Developers, Inc. entered into a Stipulation for submission of their dispute to arbitration, filed in this Court in Docket No. C104-74Ac.

19. As a result of the arbitration hearings, the arbitrators made a finding in favor of Bean and issued an Award against Middlebury Associates in the amount of $333,261.53 under date of February 18, 1977.

20. The Award of Arbitrators provided that no amount had been included in the Award for any sum which might be due to Bean from Middlebury on account of work performed by Pike.

21. Middlebury Associates has filed Motions to Vacate under the Arbitration Award both in Addison Superior Court and United States District Court.

22. Although final judgment on the arbitration award cannot be entered until the pending Motions to Vacate have been resolved, the issue as to whether there is money owing to the general contractor from the owner will be determined by the result of the arbitration and any judgment to be entered in Docket No. C104-74Ac.

23. Pike Industries, Inc. entered into an oral subcontract with R. E. Bean Construction Co., Inc. in August of 1974 wherein Pike Industries, Inc. agreed to install the parking lot.

24. Pike Industries, Inc. commenced work pursuant to the subcontract with R. E. Bean Construction Co., Inc. on August 26, 1974.

25. Pike Industries, Inc. continued working on the project without cessation, under the terms of its subcontract with R. E. Bean Construction Co., Inc., through and including October 18, 1974.

26. On Friday, October 18, 1974, Peter S. Gilfillan, representing Middlebury Associates and/or Middlebury Developers, Inc., received a telephone call from a representative of Ames Department Stores expressing concern about the ability of Ames to complete its store and move in that fall if the paving were not completed by October 21, 1974.

27. On October 18, 1974, in response to the phone call received from the Ames Department Store representative, Peter S. Gilfillan, representing Middlebury Associates/Middlebury Developers, Inc., called Bruce Homer of Pike Industries, Inc. for the purpose of expediting the completion of Pike Industries, Inc.'s work.

28. During the telephone conversation between Messrs. Gilfillan and Homer on October 18, 1974, Mr. Gilfillan, on behalf of Middlebury Associates/Middlebury Developers, Inc., authorized Pike Industries, Inc. to perform necessary overtime to complete its work under its subcontract with R. E. Bean Construction Co., Inc. by October 20, 1974 and agreed that Middlebury Associates/Middlebury Developers, Inc. would pay for such overtime and, further, would guarantee the payment of Pike's bills.

29. Prior to receiving the telephone call from Gilfillan, the plaintiff had decided to stop work because it had received no pay for the work it had done. At that time it had completed 51% of the job.

30. It was the understanding of Bruce Homer of Pike Industries from his telephone conversation with Peter Gilfillan that Middlebury Associates and/or Middlebury Developers, Inc. would guarantee the payment of the plaintiff's bill in return for an all-out effort on the part of the plaintiff to complete the job as soon as possible.

31. Homer asked for confirmation of this agreement in writing, and thereafter, on October 18, 1974, Homer received a telegram from Gilfillan stating as follows:

> "Regarding Middlebury Shopping Center persuant (sic) to our telephone conversation you are directed to bill Middlebury Developers, Inc. directly for the work performed and you are further authorized to perform all necessary overtime to complete your work by Sunday, Oct. 20, 1974."

32. Without the telegram from Peter Gilfillan, the plaintiff would not have continued on the job.

33. Although its crews worked on October 19, and 20, 1974, Pike Industries, Inc. did not complete its work by October 20, 1974. The plaintiff's work was completed on November 6, 1974.

34. No question has been raised by any of the defendants as to the quality of the plaintiff's work. Defendant Bean acknowledges that Pike's services were engaged by it and that the services were satisfactorily performed.

35. After the completion by Pike Industries, Inc. of its work, it billed R. E. Bean Construction Co., Inc. for work performed.

36. On November 25, 1974, Pike Industries, Inc. sent Middlebury Associates/Middlebury Developers, Inc. a copy of its invoices to R. E. Bean Construction Co., Inc. in response to a letter from Fitts & Olson dated November 5, 1974 to Pike Industries, Inc.

37. As a result of the failure of Middlebury Associates to make payments on requisitions for work completed, Bean received no money from Middlebury for any of the paving done by Pike Industries.

38. On December 11, 1974 Pike filed a mechanic's lien in accordance with the provisions of 9 V.S.A. Sec. 1921.

39. On March 6, 1975 the plaintiff brought this action against the defendants and attached the property of defendants Middlebury Associates and Middlebury Developers, Inc. in the Town of Middlebury.

40. Subsequently, pursuant to a Stipulation between the parties and an Order issued by this Court, both the mechanic's lien and the attachment were discharged and an appropriate surety bond substituted in lieu thereof.

CONCLUSIONS OF LAW

1. The plaintiff performed fully and satisfactorily under its contract with defendant R. E. Bean Construction Co., Inc. and is therefore entitled to judgment against defendant Bean in the amount of $115,651.13.

2. In order for the plaintiff to recover from defendants Middlebury Associates and Middlebury Developers, Inc. on the basis of the mechanic's lien, the plaintiff must establish that there is money due and owing from the owner of the property (Middlebury) to the

general contractor (Bean), the owner having the right to deduct from the sum due under the contract any set-off it had against the general contractor for expenses incurred in completing the project, as specified in the contract. *Cota v. Bloomfield,* 128 Vt. 306 (1970); *King v. Hoadley,* 112 Vt. 394 (1942). The Court concludes, on the basis of the evidence before it, that the plaintiff has not carried its burden in this regard and, therefore, is not entitled to recover on its mechanic's lien.

3. On the basis of the telephone call and telegram from Peter Gilfillan to Bruce Homer a separate contractual arrangement was established between the plaintiff and defendants Middlebury Associates and Middlebury Developers, Inc. whereby these defendants agreed to pay the plaintiff's bill in return for an all-out effort on the part of the plaintiff to complete the job as soon as possible. The plaintiff proceeded to complete the job, and no question has been raised as to the quality of the work. Although defendants Middlebury Associates and Middlebury Developers, Inc. point out that the work was not completed by the October 20, 1974 date mentioned in the telegram, it does not appear that the later completion date of November 6, 1974 resulted in any loss or prejudice to the defendants. The plaintiff is entitled to judgment against defendants Middlebury Associates and Middlebury Developers, Inc. in the amount of $115,651.13.

4. The Court is unable to find that the contract entered into between the plaintiff and defendants Middlebury Associates and Middlebury Developers, Inc. was the result of any breach of contract on the part of

defendant R. E. Bean Construction Co., Inc. Accordingly, the Cross Claim against R. E. Bean Construction Co., Inc. will be dismissed.

ORDER

It is hereby Ordered, Adjudged and Decreed that:

1. Defendants R. E. Bean Construction Co., Inc., Middlebury Associates and Middlebury Developers, Inc. are jointly and severally liable to the plaintiff in the amount of $115,651.13, plus interest at the legal rate from and after the bringing of this cause on March 6, 1975, plus costs.

2. The Cross Claim of defendants Middlebury Associates and Middlebury Developers, Inc. against defendant R. E. Bean Construction Co., Inc. is Dismissed.

3. The plaintiff's Motion to Amend Complaint to Conform with the Evidence is Denied inasmuch as the issue of unjust enrichment was not tried by the parties, either expressly or impliedly.

Dated at Middlebury, Vermont this 6th day of December, 1977.

/s/ ERNEST W. GIBSON III

/s/ MORTON A. COONS

/s/ RALPH EATON

Judges, Addison Superior Court

Vermont Supreme Court Opinion Filed
January 11, 1978

SUPREME COURT

On Appeal From Addison Superior Court
June Term, 1978

No. 57-58

PIKE INDUSTRIES, INC.,

v.

MIDDLEBURY ASSOCIATES, *ET AL.*

Present: Barney, *C.J.*, Daley, Larrow, Billings, and Hill, *JJ.*

BARNEY, *C.J.* All parties to this litigation concede that the plaintiff, Pike Industries, Inc., has not been paid for paving work done as a subcontractor on a shopping center construction project. The lack of payment, according to the findings, is not based on any challenge as to the quality of the plaintiff's work. The key question relates to determining which party is responsible for making payment to the plaintiff, the general contractor, R.E. Bean Construction Company, or the owner developer, a pair of companies, Middlebury Associates, and Middlebury Developers, Inc. These parties are all defendants in the action. Middlebury Associates contracted with the Bean company, and was the equitable owner of the property. Middlebury Associates also contracted with a related company, Middlebury Developers, Inc., with respect to financing, and that corporation held

legal title to the premises. For the purposes of this appeal we will treat them as they treated themselves, as a single entity, referred to as Middlebury.

The Bean company entered into a contract with Middlebury to construct a shopping center for a price guaranteed not to exceed $1,045,000.00, subject to any increases based on change orders. Middlebury's cost for the project was to be determined by Bean's "cost of the work" as defined in the contract, plus a fee of $41,800.00 to Bean. There was a date of December, 1973, for one part and May 31, 1974 for the balance by which time Bean was to "attempt" to complete the project.

The plaintiff, Pike, did not enter the picture until sometime in July, 1974, when it engaged with Bean by oral subcontract to do the paving work required by the contract with Middlebury. This work it carried on continuously until October 18, 1974. At that time, fifty-one per cent of the paving work had been accomplished, but Pike had received no payment from any source for its work. As a result, a tentative decision to cease operations was made.

On that same day, according to the evidence, Pike's representative was called by an agent of one of the principal tenants advising of the need to finish the paving so that the tenant could assume occupancy. On being told of the decision to stop work because of lack of payment, the tenant's agent indicated that there would be a call from the owner/developer, Middlebury.

Such a call came about. Pike's representative was urged by Middlebury's agent to not only continue the paving, but expedite it. Authorization to work overtime was

orally given and a representation made which, although the matter was disputed, the trial court found to be a guarantee by Middlebury to Pike of payment. A confirmatory telegram was sent from Middlebury to Pike which read as follows:

> Regarding Middlebury Shopping Center persuant [sic] to our telephone conversation you are directed to bill Middlebury Developers, Inc. directly for the work performed and you are further authorized to perform all necessary overtime to complete your work by Sunday, Oct. 20, 1974.

The paving work was in fact completed November 6, 1974. The lower court found that no loss or prejudice resulted from the postponed completion. At the completion of the paving a billing invoice was sent to Bean, with copies to Middlebury and others showing an amount due of $115,651.13. On November 11, 1974, according to the testimony, Middlebury advised Bean that Middlebury was terminating the contract and taking over construction. This action purported to be in accordance with a right of termination given the owner under the master contract with Bean. The findings do not reflect that the terminating action was initiated by Middlebury, but it is not a matter of dispute. The only controversy about it is whether or not the termination by Middlebury was based on justifiable cause within the provisions of the contract.

The pertinent provisions of the master contract in evidence as an exhibit, gave to the owner, Middlebury, the right to terminate on seven days' notice if certain circumstances, such as receivership, bankruptcy or failure

to pay subcontractors, among others, pertain. In such a case, the owner may go ahead and complete the construction and recover from the contractor, Bean, any costs over the contract price. At the same time, the owner engages to become liable for obligations, commitments and unsettled claims already incurred in good faith by the contractor.

Middlebury did, in fact, proceed to complete the project. The result was that a dispute arose between it and Bean concerning termination and the attempt by Middlebury to assess the cost overruns against Bean. This led to the arbitration proceedings whose relevance to the litigation now before us was contested by Middlebury.

In the meantime, Pike, still having had no pay for the work it had done, filed a mechanic's lien under 9 V.S.A. §1921 on December 11, 1974. On March 6, 1975, this action was brought to comply with 9 V.S.A. §1924. The original complaint alleged direct contracts with Bean and with Middlebury Developers, Inc., that corporation having legal title to the premises at the time the lien was filed. The complaint was amended to include an allegation of direct contract between Pike and Middlebury Associates and a count that asserted that Middlebury Developers, Inc. had guaranteed payment to Pike for all indebtedness to it incurred by Bean or by Middlebury Associates. The Middlebury answer included two cross-claims: one against Bean for $600,000 damages based on breaches of the contract between Bean and Middlebury; the second, a claim against Bean for any amounts found owing from Middlebury to Pike. The answers also raised affirmative defenses based on the Statute of Frauds and lack of consideration as to any alleged agreement between Middlebury and Pike.

It was a separate suit by Bean against Middlebury arising out of this same construction project that gave rise to the arbitration proceedings already noted. The award in favor of Bean, which is still under appeal in state court, specifically omitted any consideration of the Pike claim and its allocation between the parties. All of the litigation was delayed while the arbitration award was tested in federal court. That action was dismissed.

Although the litigation arises from a complex state of facts, the issues on appeal involve only a few aspects of the whole relationship. In defense against the judgment in favor of Pike, Middlebury acknowledges that it made a contract directly with Pike. But Middlebury views that contract as only involving the authorization of and payment for overtime necessary under the arrangement evidenced by the telegram of October 18, 1974, already quoted. It is standing on its Statute of Frauds defense because of its claim that there was no intention of making an indemnity contract involved in the October, 1974 transaction.

Taking as the first issue the sufficiency of the telegram put into evidence as the writing to satisfy the requirements of the Statute of Frauds, we find none of the parties strongly arguing its adequacy. Most of the briefing concerns itself with reasons in support of the non-application of the Statute of Frauds. Our examination of the case and the exhibits confirms that, under our law, satisfaction of the requirements of the Statute of Frauds was not demonstrated. Although the Statute is merely a rule of evidence, litigants who timely raise it are entitled to its enforcement. *Troy v. Hanafin,* 132 Vt. 76, 80, 315 A.2d 875 (1974); McDonald v. Place, 88 Vt. 80, 83, 90 A. 948 (1914).

Appendix—Vermont Supreme Court Opinion
Filed January 11, 1978

The Statute of Frauds, 12 V.S.A. §181, in subsection (2) applies to a "special promise to answer for the debt, default or misdoings of another." It requires that the agreement upon which such action is brought, or a memorandum thereof, be in writing, signed by the party to be charged, or by his lawfully authorized agent. Both the fact of signature and evidence of the authority of an agent to sign have been held essential in our law. *Couture v. Lowrey*, 122 Vt. 239, 244, 168 A.2d 295 (1961).

In this case there has been introduced no such signed document. The telegram contains no actual signature. The evidence does not disclose whether it was dispatched by telephone, or by submission of a written text. If the latter, no signed version has been introduced, if one exists, nor any signed authority of the sending agent. Therefore the Statute of Frauds bars use of the telegram as written evidence of an indemnity contract, and we so hold.

Disposition of the Statute of Frauds issue is required not only by the pleadings, but by the decision of the trial court. The judgment order below found Bean and Middlebury jointly and severally liable to the plaintiff for the full amount of the paving contract. Since the order seeks to impose liability on both Bean and Middlebury, however phrased, the trial court must have determined it to be a contract of indemnity with Middlebury in the posture of surety. But, as we have just determined, the Statute of Frauds bars such a result here.

On the other hand, the conclusions of the trial court speak of a separate contractual arrangement between Middlebury and Pike. Such a contract, in cases such as this, may not be subject to the Statute of Frauds. *Enos v. Owen,* 104 Vt. 329, 333, 160 A. 185 (1932). As is pointed out in that case, the issue of whether or not a promise is original and not under the Statute, or collateral, is usually a factual issue. The new promise is original if it contemplates a discharge of the first contracting party and the substitution of the party involved in the new contract.

The trial court's award of judgment against Bean for the full obligation runs counter to any inferences in its findings and conclusions of any separate, original contract between Pike and Middlebury. Nor is there any factual finding making any allocation of the costs of paving between Bean and Middlebury. Thus, neither the findings nor the judgment order in their present form support recovery against Middlebury on the theory of a separate, original contractual undertaking. The Statute of Frauds bars recovery on an indemnity theory. In the ordinary situation, this would be dispositive of the whole litigation in Middlebury's favor. It does not do so here.

Middlebury has acknowledged from the outset its separate obligation to Pike for the overtime work referred to in the October, 1974 telegram. This obligation as one applying to Middlebury and not to Bean has had no recognition in the allocation of contractual liability. Unresolved is the further issue of whether this original contract applied to all work done after the telegram, or to the total performance of Pike, or merely to the over-

time wages. With the Statute of Frauds barring the result reached by the trial court, these issues require resolution. Since they are questions of fact, *Pocket v. Almon*, 90 Vt. 10, 14, 96 A. 421 (1915), and are nowhere answered, we cannot achieve a final result in this Court. The matter must be remanded. Presumably, on remand, the other issues urged as being undisposed of will be dealt with consistent with the state of facts arrived at on retrial. This includes any determination of Bean's liability to Middlebury, if any, for payments Middlebury may be required to make to Pike.

Judgment reversed and cause remanded for rehearing consistent with the views expressed in the opinion.

FOR THE COURT:

ALBERT W. BARNEY
Chief Justice

Vermont Supreme Court Order Filed
January 11, 1978

ENTRY ORDER

Supreme Court Docket No. 57-78
June Term, 1978

Appealed From Addison Superior Court
Docket No._____

PIKE INDUSTRIES, INC.,

v.

MIDDLEBURY ASSOCIATES, *ET AL.*

In the above entitled cause the Clerk will enter:

Judgment reversed and cause remanded for rehearing consistent with the views expressed in the opinion.

FOR THE COURT:

ALBERT W. BARNEY
Albert W. Barney
Chief Justice Concurring
RUDOLPH J. DALEY
Rudolph J. Daley
Associate Justice
ROBERT W. LARROW
Robert W. Larrow
Associate Justice
FRANKLIN S. BILLINGS, JR.
Franklin S. Billings, Jr.
Associate Justice
WILLIAM C. HILL
William C. Hill
Associate Justice

Dissenting:

Trial Court Findings of Fact and Order
Filed October 26, 1979

PIKE INDUSTRIES, INC.,

vs.

MIDDLEBURY ASSOCIATES, *ET AL.*

Addison Superior Court
Docket No. C28-75-Ac

FINDINGS OF FACT AND ORDER

STATE OF VERMONT
ADDISON COUNTY SS.

The above matter comes on for rehearing before this Court following remand from the Vermont Supreme Court. The plaintiff is represented by W. Edson McKee, Esquire. Defendants MIDDLEBURY ASSOCIATES and MIDDLEBURY DEVELOPERS, INC. are represented by John A. Kelley, Esquire. Defendant R.E. BEAN CONSTRUCTION CO., INC., is represented by John H. Carnahan, Esquire.

In lieu of submitting additional testimony, the parties stipulated that the Court should consider the matter "based solely upon a) the evidence presently before the Court as submitted at the trial of this action on June 20, 1977, and August 15, 1977; b) the requests for findings previously submitted by the parties; c) (words illegible) memoranda and briefs as may have previously been submitted by the parties; and d) such other memoranda, briefs, and/or additional requests for findings that the parties may elect to submit to the Court on or before 15 June 1979."

Appendix—Trial Court Findings of Fact and Order Filed October 26, 1979.

Upon consideration of the evidence and the various documents set forth in the stipulation, the Court makes the following findings of fact.

1. The findings of fact set forth in the Court's Order dated December 6, 1977, paragraphs 1 through 40, are incorporated herein and found as facts as though fully set forth herein.

2. During the telephone conversation on October 18, 1974, between Messrs. Gilfillan and Homer, there was no discussion as to the substance of the contract between PIKE INDUSTRIES, INC. and R.E. BEAN CONSTRUCTION CO., INC. There is no evidence that Mr. Gilfillan knew what the terms of that contract were or that any official of MIDDLEBURY ASSOCIATES or MIDDLEBURY DEVELOPERS, INC. (hereinafter, collectively referred to as "MIDDLEBURY") knew what the terms were.

3. During the telephone conversation on October 18, 1974, between Messrs. Gilfillan and Homer, there were no discussions relative to the specifications for the work to be performed, the price of the work to be performed, when payment was to be made or the extent of the guarantee of workmanship and materials relative to the work to be performed.

4. Gilfillan, as authorized representative of MIDDLEBURY, knew that the plaintiff was the subcontractor hired by MIDDLEBURY's general contractor BEAN to do the paving work at the shopping center pursuant to certain terms and conditions. No attempt was made by either Gilfillan or Homer to negotiate any special

terms during their telephone conversation, and the Court finds that it was implicit in the understanding of each party that the work to be done by PIKE was to be done in accordance with the terms and conditions in PIKE's agreement with BEAN, together with PIKE's usual charges for overtime. In this respect, no issue has been raised by MIDDLEBURY as to the dollar amount of PIKE's bill or the quality of work performed by PIKE.

5. As a result of the telephone conversation between Gilfillan and Homer on October 18, 1974, confirmed by a telegram sent from Gilfillan to Homer later that same day, a contract was entered into between MIDDLEBURY and PIKE INDUSTRIES, INC. that PIKE would complete the work on the parking lot and that MIDDLEBURY would pay PIKE's bill, including the work done to that date, the completion of the work, and any overtime put in by PIKE in its effort to complete the project as soon as possible. Payment was to be in accordance with the provisions of the contract between PIKE and BEAN.

6. By failing to furnish adequate invoices to justify the costs incurred, BEAN violated the terms of its contract with MIDDLEBURY. On November 11, 1974, MIDDLEBURY terminated the contract and took over construction. MIDDLEBURY thereafter proceeded to complete the project.

7. Under the terms of the contract between defendant BEAN and defendant MIDDLEBURY, BEAN owes MIDDLEBURY the sum of $4,619.53 for amounts expended by MIDDLEBURY in excess of the guaranteed maximum cost for the project.

8. Inasmuch as MIDDLEBURY never made any payments to BEAN for work done by the plaintiff, defendant BEAN is not liable to indemnify MIDDLEBURY for any work done by the plaintiff either prior to October 18, 1974, or thereafter.

CONCLUSIONS OF LAW

1. On October 18, 1974, plaintiff stopped work on its paving contract for defendant BEAN, because, although plaintiff had completed 51 percent of the job, it had to that time received no payment for the work it had done. In order to induce plaintiff to resume work, so that one of the principal tenants, Ames Department Stores, could occupy its building that fall, Peter S. Gilfillan, representing MIDDLEBURY, called Bruce Homer of plaintiff PIKE on October 18, 1974. The interpretation of that telephone conversation and the ensuing telegram are at the heart of the controversy between the parties herein.

2. MIDDLEBURY urges the Court to find that it entered into contract with plaintiff only insofar as paying for overtime is concerned and that plaintiff should look to defendant BEAN for the principal amount due under the contract. It disclaims even any obligation to guarantee BEAN's payment to plaintiff. Plaintiff, on the other hand, contends that MIDDLEBURY agreed to pay the entire bill in return for plaintiff's returning to work. MIDDLEBURY's version is not a reasonable interpretation of the conversation between Gilfillan and Homer or of the subsequent telegram sent by Gilfillan to Homer. Plaintiff was not concerned about the question of working overtime in order to complete the project in a timely manner. Rather, it was concerned about receiving pay-

ment for the work it had already done as well as payment for any work it might do in the future. It had serious doubts about BEAN's financial responsibility, doubts that proved to be well founded in light of subsequent events. A promise by MIDDLEBURY merely to pay for overtime work would not have been sufficient to induce plaintiff to go back to work.

3. As was stated in *Enos v. Owens Slate Co.*, 104 Vt. 329, 333 (1932), the question of whether a contract is original or collateral

> "... is largely a question of intent, which must be gathered from the language used by the parties, judged by a consideration of their situation, and all the circumstances surrounding the transaction."

4. In *Enos*, the Court goes on to say that

> "... ordinarily a satisfactory test of the quality of the promise may be found by ascertaining whether or not the original debtor continues to be liable after the verbal promise sued on is made." (p. 333)

In this case, the plaintiff has continued to look to BEAN for payment. The plaintiff, in fact, sent bills to a number of places after completing the work, in hopes of securing payment. However, MIDDLEBURY's intervening negotiations with the plaintiff after it had pulled off the job, coupled with the fact that MIDDLEBURY never made a payment to BEAN for any of the plaintiff's work, convince this Court that BEAN ceased to be liable to the plaintiff after the conversation between Gilfillan and Homer on October 18, 1974, and the ensuing telegram later that same day.

5. The first part of the telegram directs the plaintiff "to *bill Middlebury Developers, Inc. directly* for the work performed . . . ," and only after that instruction does the telegram go on to say that the plaintiff is "*further* authorized to perform all necessary overtime . . ." (Emphasis added.) Had the intention of the parties been that Middlebury was arranging for and agreeing to pay for overtime only, it would have been more logical and reasonable for the two parts of the telegram to have been reversed. The word "further," as used in the telegram, also indicates that more was involved than just the overtime issue.

6. In an analogous case, it has been held that an oral promise by the owners to a subcontractor to the effect that if he would go ahead with the work, the owners would see that the subcontractor got his pay, was sufficient to create a primary liability on the part of the owners. *Pocket v. Almon*, 90 Vt. 10 (1916). Such is the precise situation that exists in this case.

7. MIDDLEBURY was justified in terminating its contract with BEAN when BEAN failed to furnish the invoices requested of it by MIDDLEBURY. Inasmuch as MIDDLEBURY incurred $4,619.53 in excess costs in completing the project, BEAN must pay MIDDLEBURY this amount in accordance with the terms of the contract between the two parties.

Appendix—Trial Court Findings of Fact and Order Filed October 26, 1979.

ORDER

It is hereby Ordered, Adjudged and Decreed that:

1. Defendants MIDDLEBURY ASSOCIATES and MIDDLEBURY DEVELOPERS, INC. are jointly and severally liable to the plaintiff in the amount of $115,651.13, plus interest at the legal rate from and after December 25, 1974, which date is thirty (30) days following the date of billing to said defendants by the plaintiff, plus costs.

2. Plaintiff's Complaint against defendant R.E. BEAN CONSTRUCTION CO., INC. is Dismissed, with costs to defendant BEAN.

3. R.E. BEAN CONSTRUCTION CO., INC. is liable to defendants MIDDLEBURY ASSOCIATES and MIDDLEBURY DEVELOPERS, INC. in the amount of $4,619.53, plus costs.

Dated at Middlebury, Vermont, this 26th day of October, 1979.

ERNEST W. GIBSON III

MORTON A. COONS

RALPH EATON

Judges, Addison Superior Court

Vermont Supreme Court Opinion Filed
August 14, 1981

SUPREME COURT

On Appeal from Addison Superior Court
April Term, 1981

No. 427-79

PIKE INDUSTRIES, INC.,

v.

MIDDLEBURY ASSOCIATES,
MIDDLEBURY DEVELOPERS, INC.,
R. E. BEAN CONSTRUCTION CO., INC.,
TRUSTEES OF HANOVER SQUARE
REALTY INVESTORS.

PRESENT: Barney, *C.J.*, Larrow, Billings and
Hill, *JJ.*, and Shangraw, *C.J.*,
(Ret.), Specially Assigned

ON REARGUMENT

BARNEY, *C.J.* In the original opinion in this case, we held that Pike could recover from Middlebury as a creditor beneficiary under Article 16.2 of the Contract Agreement. On reargument, Middlebury points us to Article 5.1.3 of the General Conditions, which provides:

> Nothing contained in the Contract Documents shall create any contractual relation between the Owner or the Architect and any Subcontractor or Sub-subcontractor.

Middlebury argues that through this provision, Bean (the contractor) and Middlebury (the owner) have expressly provided that Pike would have no enforceable right against Middlebury under Article 16.2 of the Agreement.

Middlebury overlooks Article 1 of the Contract Agreement which provides, "If anything in the General Conditions is inconsistent with this Agreement, the Agreement shall govern." Under Article 16.2, Middlebury terminated the contract with Bean and took over management of the project itself. That article requires Middlebury to pay Bean for any unpaid "Cost of the Work" due Bean upon termination of the contract. The contract defines "Cost of Work" as "costs necessarily incurred in the proper performance of the Work *and paid by the Contractor.*" (emphasis added). Article 14.2.1 of the General Conditions further allows Middlebury to withhold the amounts that Bean owed its subcontractors but had not paid, including Pike, until the work was finished. Finally, under Article 16.2 Middlebury assumed and became liable for Bean's obligations to its unpaid subcontractors. It would be inconsistent with Article 16.2 to allow Middlebury to take over the project, assume Bean's liability to its subcontractors, withhold payment from Bean, and then prohibit Pike from suing Middlebury directly for the amounts which, under the contract, Middlebury owes directly to Pike. We hold that Article 5.1.3 of the General Conditions does not prohibit Pike from suing Middlebury directly, once Middlebury had terminated the contract.

This interpretation of the Contract Agreement and General Conditions does not negate the provisions of Article 5.1.3. As long as the contract is in effect, that article provides that the subcontractors have no recourse against the owner; they must look to the contractor for payment on a contract basis. Presumably, that is why a project owner hires a contractor, to manage the project and serve as a single entity with which it must deal. Under this contract, once the owner (Middlebury) terminates the contract with the contractor (Bean), however, the owner steps into the contractor's shoes, so to speak, and becomes primarily liable for the contractor's obligations to the subcontractors. Any other interpretation would be inequitable, since, once the contract is terminated, the owner is not required to pay the contractor, except for costs the contractor has paid out, until the project is finished. There is a rule of construction which, given a choice, prefers that interpretation of a contract which makes it fair and reasonable. 3 A. Corbin, Contracts § 552, at 210-11 (1960).

Middlebury next argues that, since Pike's rights as a creditor beneficiary are through Bean, Pike's right to recovery can be no greater than Bean's. It then points to Article 6 of the Contract Agreement, which provides that if the final project cost exceeds the contract cost, Bean shall bear the burden of paying the excess. It also points to Article 14.2.1 of the General Conditions, which provides that, if Middlebury terminates the contract, Bean "shall not be entitled to receive any further payment until the Work is finished," and Article 14.2.2 of the General Conditions which provides that if the project costs exceed the contract costs, "the Contractor [Bean]

shall pay the difference to the Owner [Middlebury]." Only if the final cost is less than the contract cost is Bean entitled to payment, and then only the excess of the contract cost over the final cost.

The trial court found that the final cost of the project exceeded the contract cost by $4,619.53. Therefore, says Middlebury, Bean has no right of recovery against Middlebury, and neither does Pike.

Our reading of these sections only reinforces our view that Middlebury is primarily liable. Once Middlebury terminated the contract, the relationship among the parties shifted. Middlebury was no longer obliged to pay Bean until the project was completed. The purpose of that provision is so that Middlebury can pay the subcontractors directly. Indeed, Bean will get no payment until the project is completed and *paid for*, and then only if there is any excess between the project cost and the contract cost. We can see no other reason for the provisions. Middlebury argues that if Pike is allowed to recover against it, then Bean would benefit from its own alleged default. It argues that its cost for the project would exceed the guaranteed maximum cost, and that it would have no recourse against Bean for the excess payments. That is not true. Under Article 14.2.2, mentioned above, if the project cost exceeds the contract cost, Bean is liable to Middlebury for the excess. Middlebury, not the subcontractors, is responsible for obtaining the excess from Bean. The contract does not contemplate that Middlebury can leave the subcontractors fighting for a limited pool of money. The provisions do not prevent Pike from recovering from Middlebury, and no reason to do so exists.

Finally, Middlebury points out, correctly, that this Court decided the case on legal grounds not raised below or raised on appeal. It should be pointed out here, and, indeed, a review of the record makes it abundantly clear, that the legal basis for the result reached derives directly from the facts already developed in the proceedings, and the purpose of the grant of reargument was to allow the parties to make clear their contentions with respect to the legal proposition advanced in the opinion as filed. There has been no denial of opportunity to any of the parties to make legal argument on any issue.

Middlebury distinguishes *Sexton v. Greer*, 135 Vt. 343, 376 A.2d 750 (1977), on the basis that in *Sexton*, the party against whom the decision was affirmed was the plaintiff, who had the burden of proof. Although this may be a legal circumstance in aid of the result, it is not the governing concern.

Earlier cases have affirmed judgments in favor of plaintiffs. *Simpson v. Central Vermont Ry. Co.*, 95 Vt. 388, 115 A. 299 (1921); *Wood v. James*, 93 Vt. 36, 106 A. 566 (1918). As the Court said in *Wood:*

> The result reached in this case is unaffected by the fact that the question upon which the case is made to turn was not raised and presented on the argument before us; for the rule is that the judgment below should be affirmed if it can be on any legal ground, whether it be on a ground presented in argument or not. (citations omitted) The rule is otherwise where the consideration of a ground not raised below, and presented in argument before this

> Court, might, in certain circumstances, reverse the case; for the rule is that an exceptor has the burden of making the record show affirmatively that error was committed below, (citations omitted) and exceptions not briefed are waived.

Id. at 42-43, 106 A. at 569. The Court in *Simpson* pointed out that the issue did not even have to be raised below. *Id.* at 394, 115 A. at 301-02.

Let full entry be certified to the Addison Superior Court.

FOR THE COURT:

ALBERT W. BARNEY
Chief Justice

Vermont Supreme Court Order Filed
August 14, 1981

ENTRY ORDER

Supreme Court Docket No. 427-79
April Term, 1981

Appealed From Addison Superior Court
Docket No. C28-75Ac

PIKE INDUSTRIES, INC.,

v.

MIDDLEBURY ASSOCIATES,
MIDDLEBURY DEVELOPERS, INC.,
R.E. BEAN CONSTRUCTION CO., INC.,
TRUSTEES OF HANOVER SQUARE
REALTY INVESTORS.

In the above entitled cause the Clerk will enter:

ON REARGUMENT

Let full entry be certified to the Addison Superior Court.

FOR THE COURT:

ALBERT W. BARNEY
Albert W. Barney
Chief Justice Concurring
ROBERT W. LARROW
Robert W. Larrow
Associate Justice
FRANKLIN S. BILLINGS, JR.
Franklin S. Billings, Jr.
Associate Justice
WILLIAM C. HILL
William C. Hill
Associate Justice
P. L. SHANGRAW,
P. L. Shangraw
Chief Justice (Ret.),
Specially Assigned

Dissenting:

Vermont Supreme Court Order Filed
September 30, 1981

ENTRY ORDER

Supreme Court Docket No. 427-79
September Term, 1981

Appealed From Addison Superior Court
Docket No. C28-75Ac

PIKE INDUSTRIES, INC.,

v.

MIDDLEBURY ASSOCIATES,
MIDDLEBURY DEVELOPERS, INC.,
R.E. BEAN CONSTRUCTION CO., INC.,
TRUSTEES OF HANOVER SQUARE
REALTY INVESTORS.

In the above entitled cause the Clerk will enter:

Motion for reargument denied.

FOR THE COURT:

ALBERT W. BARNEY
Albert W. Barney
Chief Justice
FRANKLIN S. BILLINGS, JR.
Franklin S. Billings, Jr.
WILLIAM C. HILL
William C. Hill
ROBERT W. LARROW
Robert W. Larrow
Associate Justice (Ret.)
P. L. SHANGRAW,
P. L. Shangraw
Chief Justice (Ret.)
Specially assigned

[x] PUBLISH
[ ] DO NOT PUBLISH

Opposition

No. 81-1187

Office - Supreme Court, U.S.
FILED
JAN 25 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

MIDDLEBURY ASSOCIATES,

Petitioner,

vs.

PIKE INDUSTRIES, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT

J. PAUL GIULIANI, ESQ.
94 Main Street, P.O. Box F
Montpelier, Vermont 05602
(802-223-3479)

Counsel for Respondent

McKEE, GIULIANI & CLEVELAND, P.C.
94 Main Street, P.O. Box F
Montpelier, Vermont 05602

Of Counsel

January 18, 1982

The Leahy Press, Inc.
Montpelier, Vermont

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The Case

The Respondent, Pike Industries, Inc., agrees that the Statement of the Case as set forth in Petitioner's Petition for a Writ of Certiorari is substantially correct, with one major exception. On page 5 of Petitioner's Petition, second paragraph, it is recited that the remand was "on the sole issue of whether or not there was a direct contract between Pike and Middlebury. . . ." The remand was far more broad in nature.

Argument

Petitioner included in its pleadings to plaintiff's Complaint and in its Cross-Complaint reference to the main contract in question between it and R. E. Bean Construction Company. At trial, the Petitioner introduced into evidence the main contract and all of the material to which it referred and incorporated by reference, without any qualifications, and, thereafter, introduced evidence through witnesses concerning their terminating the contract with Bean and taking over the project under the provisions of the contract. The contract was introduced for the sole purpose of defending against a mechanic's lien claim.

The Findings of Fact dated December 6, 1977, make reference to the contract in question in paragraphs 1 through 7 inclusive. (See Petitioner's Appendix, 9a.) The Petitioner's first Motion for Reargument before the Vermont Supreme Court was granted, specifically because Petitioner addressed the same issue that it now addresses in its Petition for Writ of Certiorari, and Petitioner was permitted full and complete oral argument on its Brief and on the point in question. The Vermont Supreme Court memorialized this event in its decision, paragraph 1, Petitioner's Appendix, 39a. As a result of this latter maneuver on the part of Petitioner, it should be said to have waived any right it might claim of lack of due process.

The position of the Vermont Supreme Court that it can reach a result not raised and presented on argument or raised below is adequately set forth in its opinion (again, Petitioner's Appendix, 39a), indicating clearly that the Court has consistently done so, does so in this case, and will do so in the future.

Our examination of the cases decided in the Federal system and set forth by the Petitioner in its Argument do not impress us as being sufficient for a review of the Vermont Supreme Court's decision. The Petitioner raised the "escape clause" in its contract presumably knowing the consequences or having studied it

prior to exercising it, which would amount to an "implied consent" for the use of the contract in deciding the case. Even in determining the efficacy for a Writ of Certiorari does not limit the Supreme Court's power to decide important questions not raised by the parties. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* (1971) 402 U.S. 313.

Further, the Supreme Court of the United States has said on direct appeal to that Court from a Federal District Court that the appellants are free to urge in the Supreme Court reasons for affirming a judgment of the District Court which may not have been relied on by the District Court. *California Bankers Assoc. v. Shultz,* (1974) 416 U.S. 21. Also, a reviewing Court could affirm a dismissal order on the theory of res judicata though such defense was asserted for the first time on appeal where the complaint reveals facts which show the action was barred by the principles of res judicata.

The Court here felt it appropriate to expedite termination of the action, particularly when it was justified by what was before the Court below but had been asserted for the first time in the appellate court. *Southard v. Southard,* 305 F.2d 730 (U.S.C.A., 2nd Cir. 1962).

Finally, this effort on the part of Petitioner does not appear to set forth that a State court has decided a Federal question of substance or has decided in a way not in accordance with applicable decisions of the Supreme Court. U.S.C.S. Rule 19.

Respectfully submitted,

J. PAUL GIULIANI, ESQ.
McKee, Giuliani & Cleveland, P.C.
94 Main Street, P.O. Box F
Montpelier, Vermont 05602

Counsel for Respondent

January 18, 1982